Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 75-43

FIRST NATIONAL BANK AND TRUST COMPANY OF VIDALIA, GEORGIA,

Petitioner,

versus

FIDELITY STANDARD LIFE INSURANCE COMPANY,

Respondent.

versus

SECURITY MUTUAL CASUALTY COMPANY,

Third Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

FIRST NATIONAL BANK AND TRUST COMPANY OF VIDALIA, GEORGIA,
Petitioner.

versus

FIDELITY STANDARD LIFE INSURANCE COMPANY,
Respondent.

versus

SECURITY MUTUAL CASUALTY COMPANY,
Third Party
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above-

entitled case on March 24, 1975, petition for rehearing denied on April 14, 1975.

OPINION BELOW

The opinion of the Court of Appeals below is not yet officially reported. A copy of the unofficial report is included in the Appendix as Appendix A. It affirmed a summary judgment by the Federal District Court for the Southern District of Georgia which is also unreported, a copy of which is included in the Appendix as Appendix C. The Federal District Court authorized by its summary judgment execution on a Louisiana State Court judgment.[1]

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 24, 1975, petition for rehearing denied on April 14, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), authorizing case in the Court by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment. The time within which to apply for writ of certiorari to bring judgment in a civil action, suit or proceeding before the Supreme Court for review is ninety (90) days after entry of such judgment pursuant to 28 U.S.C.A., Sec. 2101(c).

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to consider whether the due process requirement of a full

1 The judgment record is lengthy and is included in the Appendix to the Record on Appeal in the Fifth Circuit Court of Appeals.

and fair hearing required the Federal District Court to look at the whole judgment record to determine if the court in the State of Louisiana had jurisdiction to render the judgment against a non-resident of that state where the judgment is now sought to be enforced in a second state.

2. The State Court in Louisiana used that State's Long Arm Statute to obtain jurisdiction over a non-resident defendant on the grounds that such defendant was doing business in that state and therefore found this defendant liable in a cause of action that did not arise from the defendant's business within that state but from an entirely different transaction involving other parties and not the non-resident defendant. This Court should grant Certiorari to determine whether the exercise of jurisdiction in such a situation denies the Petitioner his right to due process under the law.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. IV, Sec. 1, provides:

> "Full, Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof."

U.S. Const., Fourteenth Amendment, Sec. 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

The Louisiana Long Arm Statute, La. R.S. 13:3201, provides:

"A court may exercise personal jurisdiction over a non-resident, who acts directly or by an agent, as to a cause of acting arising from the non-resident's

(a) Transacting any business in this state;

(b) contracting to supply service or things in this state;

(c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;

(d) Causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits busi-

ness, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(e) having an interest in, using, or possessing a real right or immovable property in this state. Added Acts 1964, No. 47, #3."

STATEMENT OF THE CASE

On May 6, 1974, Respondent, a Louisiana life insurance company, instituted a civil action against Petitioner, a national bank located in Vidalia, Toombs County, Georgia, to enforce a judgment in favor of Respondent rendered by the Civil District Court for the Parish of Orleans, State of Louisiana, hereinafter called State Court. (R. 4-6)[2] The basis of Federal Jurisdiction in the District Court was diversity of citizenship in a case involving more than $10,000.00. (R. 2)

The State Court judgment was based on the following transactions, all of which are set out in the judgment record. (R. 7-18; 66-214)

On May 17, 1968, Paul W. Tippett, who was then executive vice president of Petitioner, and Nat O. Carter, at that time Petitioner's attorney, went to New Orleans, Louisiana for the purpose of negotiating a loan to Texas National Corporation, Inc., hereinafter called "Texas", and First City Financial Corporation, here-

2 References are to the printed Record on Appeal before the Fifth Circuit Court of Appeals as number for the Appendix there.

inafter called "First City". The Petitioner's representatives had been approached by representatives of Texas and First City and induced to come to New Orleans to negotiate a loan. Upon arriving in New Orleans, Petitioner's representatives were taken to a hotel where negotiations were held pertaining to the proposed loan. (R. 107-110) As a result of these negotiations, the following day Petitioner issued a loan commitment to lend First City and Texas the sum of $333,300.00 on the conditions set forth in the loan commitment. (R. 113, 200) A promissory note was signed by officers of Texas and First City in favor of Appellant and Petitioner's vice president drew a sight draft on Petitioner's corresponding bank, Citizens and Southern National Bank of Atlanta, Georgia, for $330,-000.00 (the amount stated in the loan commitment less the discounts, service charge of one (1) per cent of the total loan commitment). (R. 114-121)

After the negotiations were completed, the draft was then delivered to the National Bank of Commerce in New Orleans, Louisiana for collection and in payment of two (2) past due notes of First City held by that bank of approximately $320,000.00, plus interest. (R. 16)

Petitioner did not pay sight draft upon presentation when the conditions of the loan commitment were not met. (R. 125-126) Upon notification that the conditions of the loan commitment had not been complied with and therefore the loan commitment had been withdrawn, representatives of Texas and First City came to Vidalia, Georgia to negotiate a new loan commitment. (R. 119)

In the new loan commitment, Petitioner required Texas and First City to buy a Certificate of Deposit as one of the conditions of the loan which was to act as a compensating balance to secure the loan. Petitioner did not specify as to how Texas was to obtain the funds to purchase the Certificate of Deposit. (R. 121-122)

On its own initiative, Texas obtained bearer bonds and other securities from Respondent and delivered these to the Petitioner to be converted into cash and used to purchase the required collateral. These securities were delivered to Petitioner at its place of business in Vidalia, Georgia, on May 23, 1968, by representatives of Texas and the loan was then consummated. (R. 124)

In 1968, Respondent instituted its action in the State Court for a declaratory judgment as to the rightful owner of the bonds and other securities and Petitioner filed its plea to the jurisdiction of that court. (R. 4-6) Briefs were filed on behalf of Petitioner and Respondent (R. 67-100) and on the basis of the facts and circumstances stated above, the State Court of Louisiana held that its Long Arm Statute was sufficient to confer to it jurisdiction over the Petitioner. (R. 69)

With Petitioner still reserving its exception to jurisdiction, the matter proceeded to trial and a judgment was rendered by the court against Petitioner. (R. 66)

After Petitioner filed its answer to Respondent's Complaint then filed in Federal District Court, Respondent filed its Motion for Summary Judgment on July 22, 1974, (R. 24) and the case was called for hear-

ing on Respondent's Motion on August 2, 1974, during which time both the Respondent and the Petitioner made statements and arguments to the Court. The District Court took the case under advisement after which an order was filed in the District Court granting Respondent's Motion for Summary Judgment. (Appendix C)

On March 24, 1975, the Fifth Circuit Court of Appeals affirmed the decision of the District Court (Appendix A) and on April 14, 1975, the Court of Appeals denied Petitioner's Petition for Rehearing. (Appendix B)

ARGUMENT

This Court Should Grant Certiorari To Consider Whether The Due Process Requirement Of A Full And Fair Hearing Required The Federal District Court To Look At The Whole Judgment Record To Determine If A Court In The State Of Louisiana Had Jurisdiction To Render The Judgment Against A Non-Resident Of That State Where The Judgment Is Now Sought To Be Enforced In A Second State.

The present controversy involves a judgment obtained in the State Courts of Louisiana and sought to be enforced against the Petitioner, a Georgia corporation in the Federal District Court for the Southern District of Georgia, hereinafter called District Court. Such a State Court judgment is generally given full faith and credit by courts of sister states except where the original court rendering the judgment lacked jurisdiction or where the judgment is procured by

fraud. The Full Faith and Credit Clause, U.S. Const., Art., IV., Sec. 1, provides an orderly manner for enforcement of foreign judgments in our Federal system. But like the rest of the Federal system, there are checks and balances on this power. The Due Process Clause of the Fourteenth Amendment, U.S. Const., Fourteenth Amendment, Sec. 1, is such a check so as to prohibit the enforcement of a void judgment. The judgment sought to be enforced in the present case is void because the State Court of Louisiana lacked personal jurisdiction over the Petitioner.

The District Court made its determination that it could not look into the Louisiana Court's jurisdiction on the grounds that the Petitioner made an appearance in the original action to take exception to the Louisiana Court's jurisdiction and this exception was overruled by the minute entry under the date of May 25, 1969, "Exception Overruled". The District Court stated, Appendix C, and the Court of Appeals below affirmed, Appendix A, that this was all it was required to look at under this Court's decision, *Durfee v. Duke*, 375 U.S. 106 (1963). However, in the present case the record includes more than the minute entry "Exception Overruled" and the question arises should the District Court have considered the whole judgment record in determining whether the Louisiana Court originally had jurisdiction. This Court in *Durfee v. Duke*, 375 U.S. 106, 111 (1963) stated:

> "From this decision there emerges the general rule that a judgment is entitled to full faith and credit even as to questions of jurisdiction when the second court's inquiry discloses that

> those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment".

The key words in this rule are *fully* and *fairly*. How does a court determine whether the judgment is fully and fairly litigated if it does not look to the judgment record as a whole? Certainly, if the record is regular on its face then the presumption of validity of judgments alone without more of a showing would allow the judgment to withstand collateral attack. But where the judgment record on its face shows that the original court had no jurisdiction, then does full faith and credit oblidge the second court to blindly enforce a judgment from a court which lacked jurisdiction? The Petitioner thinks not and prior decisions of this Court have not restricted courts to do so in such cases.

Recitals as to jurisdictional facts contained in a judgment or judgment roll or record are deemed to import absolute verity and are generally conclusive as against a collateral attack unless they are contradicted by other portions of the record. See 49 CJS (Judgments), p. 843.

This Court has long recognized a second court's right to look to the whole judgment record to determine whether a foreign court had jurisdiction. In *St. Clair v. Cox*, 106 U.S. 350, 359 (1882), this Court said:

> "The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would,

> in our opinion, be sufficient prima facia evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose".

In the present case, the record has been offered as evidence in another state and it shows that jurisdiction was founded on contacts by the Petitioner in the State of Louisiana which did not give rise to the liabilities sued on in that state. The District Court did not consider these facts at all since it stopped its inquiry of the Louisiana Court's jurisdiction at "Exception Overruled".

This Court has since reaffirmed that a second court may look to the record as a whole to determine whether jurisdiction existed in foreign court judgments. See *Adam v. Saenger*, 303 U.S. 59 (1938); *Milliken v. Meyer*, 311 U.S. 457 (1940).

In *Milliken v. Meyer*, 311 U.S. 457, 462 (1940), this Court stated:

> "Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry . . . But if the judgment on its face appears to be a court of gen-

eral jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself."

Petitioner did not ask the District Court to inquire into the merits of the cause of action, the logic or consistency of the State Court's decision, it only asked that the District Court look to the judgment record as a whole and see that plainly from the record included the contacts by the Petitioner in the State of Louisiana did not give rise to the liabilities sued on in that state. This could be as easily determined from the judgment record as could the fact that the State Court had no jurisdiction of the subject matter if that were the case. The District Court did not look to the record as a whole but only to the minute entry within the record "Exception Overruled", and thereby Petitioner is denied its right to a full and fair hearing on whether the Louisiana State Court's judgment was entitled to enforcement under full faith and credit. The District Court's refusal to look to the whole record for its determination constitutes a denial of Petitioner's right to due process under the law.

The State Court In Louisiana Used That State's "Long Arm Statute" To Obtain Jurisdiction Over A Non-Resident Defendant On The Grounds That Such Defendant Was Doing Business Within That State And Therefore Found This Defendant Liable In A Cause Of Action That Did Not Arise From The Defendant's Business Within That State, But From An Entirely Different Transaction Involving

Other Parties And Not The Non-Resident Defendant. In Affirming The District Court's Granting Summary Judgment The Court Below Is Enforcing A Void Judgment Under Full Faith And Credit. This Court Should Grant Certiorari To Determine Whether Such An Exercise Of Jurisdiction Denies Petitioner His Right To Due Process Under The Law.

Once it was a rule of law that a person's presence within the territorial jurisdiction of a court was a prerequisite to that court's rendering a valid judgment personally binding on such person. *Penoyer v. Neff*, 95 U.S. 714, 733 (1877). Since then this Court has expanded that notion to include other circumstances, including territorial jurisdiction exercised under a long arm statute like that in the present case. La. R.S. 13:3201. In *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945), this Court said that:

> "Due process requires only that in order to subject a defendant to a judgment in personam, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice."

Thereafter, courts across the nation in deciding the question of jurisdiction over a non-resident defendant began to look to the facts of each case and weigh the contacts involved. But the Court in that case not only held that the minimum contacts must be weighed to

determine jurisdiction but the contacts must also give rise to the liabilities sued on.

> "Presence in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic but *also give rise to the liabilities sued on.* . . . Conversely, it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in a corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 317 (1945). See also *St. Clair v. Cox*, 106 U.S. 35 (1882).

In another landmark case in this area of the law this Court said:

> "It is sufficient for the purpose of due process that the suit was *based on* a contract which had substantial connection with that state". *McGee v. International*, 355 U.S. 220, 223 (1957).

This case was followed by *Hanson v. Denckla*, 357 U.S. 235, (1958), which made it clear that all restrictions on the personal jurisdiction of state courts was not removed. The Court there said:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that state that are a prerequisite to its exercise of power over him." 257 U.S. 251.

In this light the Court looked at the facts of that case and saw that a fundamental prerequisite to Florida's power over the non-resident defendant was not present.

> "The cause of action is not one that arises out of the act done or the transaction consummated in the forum state". *Hanson*, supra, at 251.

In *Hanson*, a trust was created in the State of Delaware after which one of the settlers moved to the State of Florida. None of the trust assets were in Florida except some of the disbursements of trust income to the settlor in Florida. The action was brought in Florida to determine the validity of the trust. The facts of the present controversy are similar in that a commitment was given by the Petitioner to make a loan to corporations other than Respondent. These corporations upon their own independent actions, not in any way involving Petitioner, obtained the collateral for this loan from Respondent. In other words, there were two

distinct and separate transactions involving the collateral in question here. The suit in the original state was a declaratory judgment type action to establish the owner of the collateral (personalty at that time located in the State of Georgia). The Petitioner had no office nor any other transactions in Louisiana and the State Court in Louisiana must have found jurisdiction on the only contact Petitioner had in that state which was with corporations other than the Respondent. All of these facts are set out in the documents included in the judgment record and should have been considered by the District Court. It is possible that the Louisiana Court could have found sufficient contacts to support jurisdiction in a suit by the two corporations delivering the collateral to the Petitioner or a suit by the Respondent against the Petitioner if the loan commitment were between these parties. But neither of these situations are true as is shown in the judgment record. The judgment record does, however, show that in this case, like *Hanson*, Supra, the cause of action is not one that arises out of the act done.

This exercise of jurisdiction goes beyond the territorial limitations on the power of the State of Louisiana. This Court has never held that merely passing through a state or contracting with one person there opens one up to suits from anyone no matter how unrelated the basis of the litigation may be to the contact in that state. By affirming the opinion of the District Court, the Court of Appeals below is extending the minimal contacts doctrine far beyond any jurisdictional test laid down by this Court.

Allowing the Respondent to execute on a judgment with jurisdiction based on the facts set out in the judgment record will deny Petitioner its right to due process under the law and goes far beyond any test establishing jurisdiction set out by this Court.

CONCLUSION

The certiorari should be granted, and the Judgment of the United States Court of Appeals for the Fifth Circuit should be Reversed.

Respectfully submitted,

LAW OFFICES OF
PAUL W. CALHOUN, JR., P.C.

Attorney for Petitioner

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CERTIFICATE OF SERVICE

I, PAUL W. CALHOUN, JR., of counsel for Petitioner in Certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have on this day served copies of the foregoing petition for the writ of certiorari upon each opposing counsel in the following manner:

By depositing in the United States Mail a copy of said Petition and addressed to the following persons:

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I further certify that sufficient postage has been attached thereon to insure delivery as required by Rule 33 of the Supreme Court Rules.

This ____ day of July, 1975.

Paul W. Calhoun, Jr.
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-3844
Summary Calendar

D. C. Docket No. CA-CV-674-8

FIDELITY STANDARD LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

versus

FIRST NATIONAL BANK & TRUST COMPANY OF VIDALIA, GEORGIA,
Defendant-Third-Party
Plaintiff-Appellant,

versus

SECURITY MUTUAL CASUALTY COMPANY,
Third-Party Defendant.

Appeal from the United States District Court for the
Southern District of Georgia

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-third party plaintiff appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 24, 1975

Issued as Mandate:

FIDELITY STANDARD LIFE INSURANCE COMPANY, Plaintiff-Appellee,

versus

FIRST NATIONAL BANK & TRUST COMPANY OF VIDALIA, GEORGIA, Defendant-Third-Party Plaintiff-Appellant,

versus

SECURITY MUTUAL CASUALTY COMPANY, Third-Party Defendant.

No. 74-3844
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

March 24, 1975.

Paul W. Calhoun, Jr., Vidalia, Ga., Little, Schwartz & Dussom, New Orleans, La., for defendant-third-party plaintiff-appellant.

Robert S. Reeves, Swainsboro, Ga., Harry McCall, Jr., New Orleans, La., Dow N. Kirkpatrick, II, Earle B. May, Jr., Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

PER CURIAM:

Fidelity Standard Life Insurance Company sued in federal district court below to enforce a $281,685.71 judgment against appellant which it obtained in Civil District Court in Orleans Parish, Louisiana. In a thorough and well-reasoned opinion, Judge Lawrence held that the Louisiana judgment was entitled to full faith and credit and granted summary judgment in favor of Fidelity Standard. On appeal, appellant claims that the district court erred in not looking behind the Louisiana judgment to determine whether Louisiana properly asserted *in personam* jurisdiction over appellant under Louisiana's long-arm statute. We agree with the district court that the jurisdictional issue could not be collaterally relitigated, and therefore affirm.

Appellant's sole argument is that the Louisiana judgment is void because that state lacked jurisdiction to determine the case. But the jurisdictional issue was duly raised, argued and decided by the Louisiana Civil District Court. Because the jurisdictional issue was fully litigated in the original court, this issue may not be relitigated by way of collateral attack. The Supreme Court has noted that its decisions have "carefully delineated the permissible scope" of an inquiry into a foreign court's jurisdiction to render a judgment when a court is asked to give effect to the judgment of another state. Durfee v. Duke, 375 U.S. 106, 111, 84 S.Ct. 242, 245, 11 L.Ed.2d 186 (1963).

> From these decisions there emerges the general rule that a judgment is entitled to full faith and credit — *even as to questions of jurisdiction* — when the second court's inquiry discloses that those questions have been fully

> and fairly litigated and finally decided in the court which rendered the original judgment.

375 U.S. at 111, 84 S.Ct. at 245 (emphasis added). Accord, Sherrer v. Sherrer, 334 U.S. 343, 348, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948); Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939); Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931). There is no contention raised here that the Louisiana judgment is not final, or that the jurisdictional issue had not been actively litigated and fairly decided in the Louisiana forum. Thus, the lower court was obligated to give full faith and credit to the judgment.

The Louisiana judgment is presently pending appeal in the state court system. This fact does not affect the judgment's binding force in a second court as to all issues, including that of jurisdiction, where the appeal remains binding and final between the parties under the law of the state rendering the judgment. Denham v. Shellman Grain Elevator, Inc., 5 Cir., 1971, 444 F.2d 1376, 1380; Maner v. Maner, 5 Cir., 1969, 412 F.2d 449, 451. A case pending appeal is *res judicata* and entitled to full faith and credit unless and until reversed on appeal. Grantham v. McGraw-Edison Co., 7 Cir., 1971, 444 F.2d 210, 217; Prager v. El Paso National Bank, 5 Cir., 1969, 417 F.2d 1111; A. F. Pylant, Inc. v. Republic Creosoting Co., 5 Cir., 1961, 285 F.2d 840, 841-842; United States v. Nysco Laboratories, E.D.N.Y., 1963, 215 F.Supp. 87, 89, aff'd, 2 Cir., 318 F.2d 817; 1B J. Moore, Federal Practice ¶ 0.416[3] (1974). Thus, should appellant prevail on its jurisdictional claim in the Louisiana courts, it would be entitled to relief from judgment in the court below.

Affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3844

FIDELITY STANDARD LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

versus

FIRST NATIONAL BANK & TRUST COMPANY OF VIDALIA, GEORGIA,
Defendant-Third Party
Plaintiff-Appellant,

versus

SECURITY MUTUAL CASUALTY COMPANY,
Third Party Defendant.

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION FOR REHEARING

(April 14, 1975)

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SWAINSBORO DIVISION

FIDELITY STANDARD LIFE INSURANCE COMPANY,
Plaintiff,

versus C.A. No. 674-8

FIRST NATIONAL BANK & TRUST COMPANY OF VIDALIA, GEORGIA,
Defendant and Third
Party Plaintiff,

versus

SECURITY MUTUAL CASUALTY COMPANY,
Third Party Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Fidelity Standard Life Insurance Company sues in this Court for enforcement of a judgment of $281,685.71 against First National Bank & Trust Company of Vidalia, Georgia, entered in the Civil District Court for the Parish of Orleans, Louisiana, on December 10, 1973. An appeal is now pending in the Louisiana Court of Appeals.[1]

Admitting that it has not paid the judgment in question, defendant asserts in its answer that the Civil District Court in Louisiana was without jurisdiction to decide the case; that the judgment entered is not a final one as required by the Full Faith and Credit clause, and that the loan agreement on which the judgment is based was infected or procured by fraud.[2]

Plaintiff moves for summary judgment. In support thereof, it has attached (a) a certified copy of the exception to jurisdiction filed in the District Court for the Parish of Orleans; (b) copies of the memoranda of law in connection therewith; (c) copies of the Notice of Appeal and Motion therefor in the District Court for the Civil District of Orleans Parish, and (d) copies of the depositions of the Executive Vice President of the

1 This Court is unaware of the precise status of the appeal. It has not been argued and apparently no decision can be expected for some months.

2 First National Bank has filed a third-party complaint against Security Mutual Casualty Company, claiming that the third-party defendant issued a Banker's Blanket Bond insuring it against any loss incurred as a result of the Louisiana judgment. That phase of the case is not now before this Court.

defendant Bank, P.W. Tippett, and its attorney, the late Nat Carter.

It appears that in May, 1968, certain complicated loan transactions were the subject of negotiations between First National Bank of Vidalia, a national banking institution, and Fidelity Standard Life Insurance Company, a Louisiana corporation. They took place at New Orleans and at Vidalia, Georgia. Agreements between the parties were entered into.

Subsequently, Fidelity Standard brought suit against First National in the Civil District Court in Orleans Parish to recover securities alleged to have been wrongfully appropriated by the defendant Bank in connection with the loan transactions referred to. Service on defendant was perfected under the Long-Arm statute of Louisiana. Judgment was rendered by the trial court in the amount previously stated.[3]

Plaintiff's motion for summary judgment raises three issues:

(1) Whether this Court can look behind the Louisiana judgment to determine independently whether it had jurisdiction under the Long-Arm statute.

(2) Whether the judgment of the Louisiana court is a final one so as to be entitled to recognition and enforcement in this jurisdiction under the Full Faith and Credit clause.

3 The non-jury trial which was a lengthy one followed extended discovery proceedings.

(3) Whether the contention that the loan agreements on which the Louisiana judgment was based were procured by fraudulent transactions represents a valid defense to the action in this Court to enforce same.

Briefs were filed by the parties following oral argument on August 2nd last. Before considering the legal questions presented by plaintiff's motion for summary judgment, a few preliminary comments as to full faith and credit are in order.

Article IV, Section 1 of the federal Constitution provides:

> "Full faith and credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may be general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof."

Title 28 U.S.C. § 1738 which was enacted pursuant to the Full Faith and Credit Clause deals with the effect to be accorded judicial proceedings in other courts of the United States. It provides for a uniform manner of authenticating such proceedings and states that "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

A judgment proved in the manner provided by 28 U.S.C. § 1738 is likewise entitled to receive the same force, recognition and effect in any United States court as it would receive in the courts of the state where the judgment was rendered. *Davis v. Davis*, 305 U.S. 32, 40; *Williams v. Murdoch*, 330 F.2d 745, 751 (3rd Cir.).

I

UNDER THE FACTS SHOWN IN THE RECORD, CAN THIS COURT LOOK BEHIND THE LOUISIANA JUDGMENT TO DETERMINE INDEPENDENTLY WHETHER THE STATE COURT IN RENDERING SAME POSSESSED JURISDICTION OVER THE DEFENDANT PURSUANT TO THE LONG-ARM STATUTE OF LOUISIANA?

Defendant claims that the Civil District Court in Louisiana was without jurisdiction over it and that the judgment rendered against the Bank is not entitled to recognition and enforcement in this jurisdiction.

When a court is called on to enforce a foreign judgment, it may properly examine the basis for jurisdiction of the court in which the judgment was entered. However, the extent of inquiry into jurisdiction is limited, the scope of examination being thus defined in *Durfee v. Duke*, 375 U.S. 106, 111:

> ". . . while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully

> delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

Included in the record attached to plaintiff's motion for summary judgment is an Exception to Jurisdiction filed on behalf of defendant in the Louisiana action in 1968. Making a limited appearance for that purpose only, First National challenged the jurisdiction of the Louisiana court. Defendant contended that it had no personnel in Louisiana and did no business in that State and that, while the loan commitment was negotiated by the Bank's representatives at New Orleans, its co-defendants failed to supply agreed collateral as required by the commitment whereupon a new agreement (or novation), involving different collateral, was negotiated and entered into in Georgia.

Attached to the motion for summary judgment by Fidelity Standard in this Court are copies of the rather extensive briefs in the Louisiana court dealing with the applicability of that State's Long-Arm statute.[4] On the last page of the Exception to the Jurisdiction the following "minute entry" under the date of May 25, 1969, appears: "Exception Overruled."

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4 The factual setting in which the jurisdictional question was decided included lengthy discovery of the two representatives of First National.

The record before me demonstrates that the jurisdictional question was raised and fully litigated in the Civil District Court of Louisiana.[5] The issue was decided against the Bank. To be sure, the entry of the ruling of the trial court was two words long. For purposes of according full faith and credit, this Court would have preferred a more extensive exposition of reasons for the decision. However, brevity does not weigh against the effectiveness of the judgment of the court of original jurisdiction. There is a presumption in favor of regularity. *Kalb v. Feuerstein*, 308 U.S. 433, 438; *Michoner v. Johnston*, 141 F.2d 171, 175 (9th Cir.).

What the Bank is trying to do here is to relitigate the jurisdictional issue as to applicability of the Long-Arm statute. This it cannot do. In the case of collateral attack on the judgment of another court respecting jurisdiction over defendant's person, once it is shown that such issue was fully litigated in the original court, binding effect must be accorded to same under the Full Faith and Credit Clause. *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522. Where a respondent had his day in court on every issue, including the jurisdictional question of petitioner's domicile, "there is nothing in the concept of due process which demands that a defendant be afforded a

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5 Defendant's objection to jurisdiction of the Louisiana court was based solely on the applicability of the Long-Arm statute. There was no reliance on 12 U.S.C. § 94 which provides that suits against national banks be brought "in any district . . . court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases." See *Mercantile National Bank v. Langdeau*, 371 U.S. 555; *Northside Iron and Metal Company, Inc. v. Dobson and Johnson, Inc.*, 480 F.2d 798 (5th Cir.); *Swiss Israel Trade Bank v. Mobley*, 319 F. Supp. 374 (S.D., Ga.).

second opportunity to litigate the existence of jurisdictional facts." *Sherrer v. Sherrer*, 334 U.S. 343, 348. "It is well settled that when the question of jurisdiction is made the court has jurisdiction to pass upon that question, and if it holds that it has jurisdiction and proceeds to judgment, the judgment is not a nullity, though the question of jurisdiction may have been erroneously decided." *National Park Bank v. McKibben*, 43 F.2d 254, 255 (M.D., Ga.).

I leave this phase of the case with the observation that if the Civil District Court of Orleans Parish wrongly decided the jurisdictional issue, its error will be corrected on the appeal now pending.

II

IN VIEW OF THE PENDENCY OF THE APPEAL IN LOUISIANA, DOES THE JUDGMENT OF THE COURT IN THAT STATE POSSESS THE NECESSARY FINALITY UNDER THE FULL FAITH AND CREDIT CLAUSE FOR ENFORCEMENT THEREOF IN THIS JURISDICTION?

A judgment of a state court in order to be given full faith and credit in another jurisdiction must be a final judgment adjudicating the litigation in a conclusive manner. 50 CJS Judgments § 889(3); *Resolute Insurance Company v. North Carolina*, 276 F. Supp. 660, 666 (E.D., N.C.), aff'd. 397 F.2d 586 (4th Cir.), cert. den. 393 U.S. 978. In 47 Am Jur 2d Judgments § 1269, it is said:

> "The fact that a foreign judgment is subject to an appeal does not render it interlocutory within the meaning of the rule denying full faith and credit to interlocutory judgments; the full faith and credit clause of the United States Constitution applies as soon as a judgment is enforceable, and not merely after the time to appeal has elapsed. Similarly, although there is some authority to the contrary,[6] a judgment from which an appeal has been taken without supersedeas has also been regarded as a final judgment entitled to be accorded full faith and credit, even though the appeal is still pending in the court of the original jurisdiction."

The finality of the judgment of a state court, the enforcement of which is sought in another jurisdiction, depends on the law of the state in which same was originally entered. *Nowell v. Nowell, supra; Crayne v. Crayne*, 54 Nev. 205, 13 P.2d 222; 50 CJS Judgments § 889(3); 47 Am Jur 2d § 1271. "The Full Faith and Credit Clause and the statute which implements it . . . require the judgments of the courts of one state to be given the same faith and credit in another State as they have by law or usage in the court of the State rendering them." *Morris v. Jones*, 329 U.S. 545. *Maner v. Maner*, 412 F.2d 449 (5th Cir.) dealt with the enforceability in a federal court in Alabama of the judgment of a circuit court in Florida pending an appeal in that State. "Since the judgment is final for purposes of execution in the state of its rendition, comity compels us

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6 See, for example, *Re Forslund*, 123 Vt. 341, 189 A.2d 537; *Nowell v. Nowell*, 157 Conn. 470, 254 A.2d 889, cert. den. 396 U.S. 844.

to hold," said the Fifth Circuit, "that it can be regarded no less than final in Alabama." In *Ferster v. Ferster*, 220 Ga. 319 a proceeding was brought in the Georgia courts based on a Maryland judgment. "The record is silent as to any supersedeas of the Maryland decree, hence it is enforceable," concluded the Supreme Court of Georgia.

Counsel for the Bank suggest that under Louisiana law appellate review is unique in that the constitutional right thereto in civil cases extends both to law and fact. Although findings by a trial judge or jury are entitled to great weight on appeal, the appellate court must review the facts as well as the law and set aside a verdict where it is clearly erroneous. *Deshotel v. Aetna Casualty & Surety Company*, 269 So.2d 850. This dilutes, it is argued, any finality in a ruling as to existence of jurisdiction.

The difference between the Louisiana and the conventional rule in appellate review is one of mere degree. On the one hand, there is ascertainment of whether the finding is not clearly erroneous and, on the other, the appellate court looks for adequate supporting evidence. The point is that in Louisiana a judgment below is final until it is set aside above.

In this setting, I turn to the law of Louisiana as to the effect of the pendency of appeal upon the execution of a judgment prior to appellate decision.

The Code of Civil Procedure of Louisiana provides for two types of appeal — a devolutive and a suspensive appeal. The former is one which "does not sus-

pend the effect of the execution of an appealable order or judgment" and may be taken within ninety days after any application for new trial is ruled upon if presented. LSA-C.C.P. Art. 2087.[7] A suspensive appeal is one that "suspends the effect or the execution of an appealable order or judgment" and must be taken within fifteen days after any application for new trial is ruled upon if presented. LSA-C.C.P. Art. 2123.[8] A creditor in Louisiana may proceed with the execution of a judgment only after the time for taking a suspensive appeal has lapsed. LSA-C.C.P. Art. 2252. Consistent with the district nature of the suspensive and devolutive appeals, the requirements of security for such appeals are different. A devolutive appeal bond provides security for court costs only; a suspensive appeal bond requires security for the judgment as well

7 Delay for taking devolutive appeal: "Except as otherwise provided by law, an appeal which does not suspend the effect or the execution of an appealable order or judgment may be taken, and the security therefor furnished, only within ninety days of:
(1) The expiration of the delay for applying for a new trial, as provided by Article 1974, if no application has been filed timely;
(2) The court's refusal to grant a timely application for a new trial, if the applicant is not entitled to notice of such refusal under Article 1914; or
(3) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial, if the applicant is entitled to such notice under Article 1914."

8 Delay for taking suspensive appeal: "Except as otherwise provided by law, an appeal which suspends the effect or the execution of an appealable order or judgment may be taken, and the security therefor furnished, only within fifteen days of:
(1) The expiration of the delay for applying for a new trial, as provided by Article 1974, if no application has been filed timely,
(2) The court's refusal to grant a timely application for a new trial, if the applicant is not entitled to notice of such refusal under Article 1914; or
(3) The date of the mailing of notice of the court's refusal to grant a timely application for a new trial, if the applicant is entitled to such notice under Article 1914."

as court costs.[9] LSA-C.C.P. Art. 2124; *Lakeside Rambler Sales, Inc. v. Durad Corporation*, 228 So.2d 745 (La.App.).

Under Louisiana law, an appeal may be found to be devolutive or suspensive by determining when the appeal was filed and the amount of the security bond furnished. *Lakeside Rambler Sales, Inc. v. Durad Corporation, supra; Cousin v. Louisiana State Board of Health*, 138 So.2d 836 (La. App.). The Bank elected to file a devolutive appeal from the judgment of the Civil District Court. Its Notice of Appeal from the judgment of December 10, 1973, was not filed until March 19, 1974. There is no indication whether the defendant had filed a motion for new trial and it is therefore impossible to determine whether the Notice of Appeal was filed more than fifteen days after the Court's refusal to grant a new trial. The record reflects, however, that the appeal bond posted by the Bank was only in the amount of $500 and necessarily represented security for costs only.[10]

After the time for filing a suspensive appeal has gone by, the party who obtained judgment in the Civil District Court has the right to execute same and the losing party possesses no valid remedy to prevent execution of the judgment. *Home Insurance Co. v. South-*

9 There is no right to a suspensive appeal unless the security is filed within the required period. Failing to do so, only a devolutive appeal may be taken. *Ziegler v. Barbin*, 238 So.2d 807 (La. App.).

10 The security required for a suspensive appeal is determined in accordance with the following rule: When the judgment is for a sum of money, the amount of the security shall exceed by one-half the amount of the judgment, including the interest allowed by the judgment to the date the security is furnished, exclusive of costs. LSA-C.C.P. Art. 2124.

ern Specialty Sales Co., 222 So.2d 649, 651 (La. App.); *Portier v. Marquette Casualty Company*, 160 So.2d 585 (Sup. Ct.); *Duffey v. Mississippi River Bridge Authority*, 126 So.2d 656 (La. App.); *Austin v. Currie*, 134 So. 723 (La. App.).

As stated in *Norman v. Guarisco*, 116 So.2d 872, 876 (La. App.), the "suspensive appeal suspends the entire proceeding and all matters in connection therewith . . . while the devolutive appeal does not prevent execution of the judgment. . . ." In either event, the finality of the judgment is suspended but it remains "a final and definitive judgment" from which an appeal may be taken. At 876.

A judgment creditor in Louisiana is entitled to enforcement of the judgment when a devolutive appeal is taken. This Court must give the same effect to a judgment of that State as it would be entitled to in Louisiana and defendant is not entitled, under the law of that State, to a stay of execution of the judgment pending decision in the devolutive appeal.[11]

11 In event of entry of judgment by this Court the effect would be an automatic stay for ten days during which time defendant Bank could apply for a stay pursuant to Rule 62(a), F.R.Civ.P. If defendant elects to appeal, it may obtain a stay with this Court's approval by filing a supersedeas bond. The Bank posted security only for costs pending the appeal in the Louisiana action. The appeal being devolutive does not bar execution of the judgment taken by the Bank. If a suspensive appeal had been taken so as to stay the execution of the Louisiana judgment as far as Fidelity Standard is concerned, the defendant Bank would have been required to post security for 1 1/2 times the amount of the judgment. Should this Court refuse to enforce the Louisiana judgment, the effect thereof would be to grant the defendant Bank a *suspensive* appeal in the Louisiana case without requiring the necessary security under the laws of that State.

The Louisiana judgment possesses the requisite of finality that requires recognition and enforceability thereof under the Full Faith and Credit Clause.

III

DOES THE BANK'S CONTENTION THAT THE LOAN AGREEMENTS WERE PROCURED BY FRAUD CONSTITUTE A VALID DEFENSE TO THE ENFORCEMENT BY THIS COURT OF THE LOUISIANA JUDGMENT?

Defendant contends in its answer that "this suit and the suit pending in the Civil District Court for the Parish of Orleans . . . arises out of a series of fraudulent acts and transactions by and between inter-related insurance and holding companies" and that as "a result of the fraudulent and questionable acts and transactions by and between said companies, this Court should not grant full faith and credit to the Louisiana judgment. . . ."

The general rule is that full faith and credit does not have to be accorded a judgment where the collateral attack is based on its procurement through fraud. 50 C.J.S. Judgments § 895. However, the impeachment of a foreign judgment is limited to existence of fraud that is extrinsic in its nature, that is, fraud preventing one from having a real contest of the suit based on conduct or activities outside of the court proceedings themselves. See 47 Am Jur 2d Judgments § 1239; 46 Am Jur 2d §§ 710, 826. Intrinsic fraud is unavailing as the basis of collateral attack. It consists of fraudulent acts that pertain to an issue involved in the original action

which was litigated or could have been litigated therein. 46 Am Jur 2d § 826, pp. 982-983. See also *United States v. Throckmorton*, 98 U.S. 61; *Fisbe v. Buker*, 125 F.2d 841, 849 (8th Cir.); *Young v. Young*, 188 Ga. 29, 31; 15A *Words & Phrases* (1950 ed.), pp. 732-745.

The fraud claimed in the Bank's answer in the instant case is intrinsic in nature. It relates to alleged acts and transactions by the plaintiffs and others in respect to the loan obligation sued on in Louisiana. Such conduct could have been the subject matter of a defense in the litigation in that State. It is insufficient to keep this Court from according full faith and credit to the Louisiana judgment.

ORDER

There being no genuine dispute as to the facts and the issues as to the law being clear, plaintiff's motion for summary judgment is granted. Judgment will be entered for plaintiff in this Court upon submission of a proposed form thereof. It will cover the amount of the Louisiana judgment together with interest and the costs of the present action.

This October 2nd, 1974.

/s/ ALEXANDER A. LAWRENCE
CHIEF JUDGE,
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SWAINSBORO DIVISION

FIDELITY STANDARD LIFE INSURANCE COMPANY,
Plaintiff,

versus C.A. No. CV-674-8

FIRST NATIONAL BANK & TRUST COMPANY OF VIDALIA, GEORGIA,
Defendant and Third
Party Plaintiff,

versus

SECURITY MUTUAL CASUALTY COMPANY,
Third Party Defendant.

JUDGMENT

Pursuant to the Order of this Court dated October 2, 1974 granting Plaintiff's Motion for Summary Judgment, it is hereby ORDERED, ADJUDGED and DECREED as follows:

(1) That the portion of the Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, entered on December 10, 1973 in Civil Action No. 483-840 (a copy of which is attached hereto and made a part hereof) which provides:

"It is ORDERED, ADJUDGED and DECREED that there be judgment herein (1) in favor of the plaintiff, Fidelity Standard Life Insurance Company, and against the defendant, First National Bank and Trust Company of Vidalia, Georgia, in the sum of $281,685.71, with legal interest from the 3d day of October, 1968 until paid and for the full costs of these proceedings, subject, however, to a credit in the amount of $40,000 if and at such time as defendant returns to plaintiff Certificate of Deposit No. 1302 of the Capital Bank and Trust Company, Baton Rouge, Louisiana in the amount of $40,000."

be and the same is hereby made the Judgment of this Court; and

(2) That plaintiff Fidelity Standard Life Insurance Company recover of defendant First National Bank and Trust Company of Vidalia, Georgia the costs of this action.

This 15th day of October, 1974.

/s/ ALEXANDER A. LAWRENCE
Chief Judge,
United States District Court,
Southern District of Georgia